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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

JOSHUA C. AGSALUD, Director of Labor and Industrial Relations of the State of Hawaii; and ORLANDO K. WATANABE, Administrator of the Disability Compensation Division of the Department of Labor and Industrial Relations of the State of Hawaii,
Appellants,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a Delaware corporation,
Appellee.

On Appeal from the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

1. The principal thrust of the Motion to Dismiss or Affirm ("Motion") is that the two issues raised in our Jurisdictional Statement have already been definitively settled: Congress, it is said, conclusively determined that the Hawaii Prepaid Health Care Act ("Hawaii Act" or "Act") is not a disability insurance law within the meaning of § 4(b)(3) of ERISA, 29 U.S.C. § 1003(b), when it failed in 1980 to create an express exception for the Hawaii Act. Motion at 5, 7. And, appellee claims, this Court in *Alessi v. Raybestos-Manhattan, Inc.*, 49 U.S.L.W. 4503 (May 19, 1981), settled any conceptual conflict among lower courts as to ERISA preemption issues generally. Motion at 6, 11-13. To the contrary, both Congress in the relevant legislative materials and this Court in *Alessi* expressly and pointedly declined to settle the issues which justify plenary consideration of this case.

A. *Congressional Action.* Appellee has conveniently left out of its truncated version of the legislative events several critical facts:

First, and most important, Congress made as clear as it possibly could that the failure to enact an express exception for the Act was not to be given any substantive significance. The conference report specifically stated:

> In adopting the House position, the Conferees do not imply a position as to the effect of section 514 of ERISA on the Hawaii Prepaid Health Care Law or other similar State laws, or as to correctness of any court decisions in this area.
>
> H.R. Conf. Rep. No. 96-1343, 96th Cong., 2d Sess., at 4.

Thus, Congress itself repudiated the view of its actions appellee is now pressing upon this Court.

Second, the actual sequence of events confirms that, as the Conference report indicates, the 1980 amendment did not fail on its merits. Rather, its failure stemmed from the attempt to enact it as part of the multiemployer bill, despite the fact that the leadership of the House of Representatives had determined to oppose for tactical purposes non-germane amendments to that bill.[1]

Third, it was repeatedly asserted by legislators sponsoring an express exception to ERISA preemption for the Hawaii Act that Congress never intended preemption of such legislation in the first place, and that an amendment was needed only because the district court misunderstood Congress' intent. Senator Matsunaga, for example, stressed

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[1]As Senator Matsunaga, the author of the proposed amendment, later explained:

> [T]o secure passage of the Multiemployer Pension Plan Amendments Act of 1980[,] I agreed to the deletion of my amendment in the House-Senate conference on the bill. The distinguished chairman of the House Task Force on Welfare and Pension Plans, acting for the House Labor committee chairman, said that he had no problems with the substance of my amendment, but opposed it as a rider on the multiemployer bill, H.R. 3904 . . . .
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> 126 Cong. Rec. (Sept. 24, 1980) S1335.

See 126 Cong. Rec. (Aug. 26, 1980) S11675 (remarks of Sen. Matsunaga); *id.* (remarks of Sen. Dole); 126 Cong. Rec. (Aug. 26, 1980) H7863 (remarks of Rep. Long); 126 Cong. Rec. (Aug. 26, 1980) H7864 (remarks of Rep. Thompson); 126 Cong. Rec. (Aug. 28, 1980) H8066 (remarks of Rep. Thompson); 126 Cong. Rec. (Sept. 18, 1980) S12900 (remarks of Sen. Williams); 126 Cong. Rec. (Sept. 19, 1980) H9178 (remarks of Rep. Thompson).

that "congress clearly never intended to preempt [the Hawaii Act]" (126 Cong. Rec. (Aug. 26, 1980) S11674):

> During the 95th Congress, Senator Inouye and I introduced legislation which would *clarify this intent of Congress* with respect to the preemption of the Hawaii Prepaid Health Care Act. Over the past 3 years, the hearing records of both the Committee on Labor and Human Resources and the Committee on Finance have explicitly and conclusively indicated that *the preemption of the Hawaii health insurance law was never envisioned or intended by Congress.* In fact, both committees have acknowledged the need to correct this serious ambiguity in ERISA preemption authority through the approval of the Matsunga amendment to S. 1976, the Senate companion bill to H.R. 3904.
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> *Id.* (emphasis supplied).

Nowhere in the legislative history does any senator or member of Congress dispute Senator Matsunga's characterization of Congress' 1974 intent, or suggest that the preemption of statutes such as the Hawaii Act was envisioned by Congress.

Given these circumstances, this Court's observation in *United States v. Price,* 361 U.S. 304, 310-11, that "nonaction by Congress affords the most dubious foundation for drawing positive inferences" applies with particular force. In *Price,* as here, it was argued that the failure of Congress to enact "an express repudiation of [certain court] decisions" should lead the Court to "infer an acceptance of the Ninth Circuit's position." *Id.* at 310. The Court declined the invitation, noting that the legislative materials might as well be said to support the opposite inference—"that the [petitioner's] interpretation of the statute was correct,

and that clarification was called for only because of the doubts caused by the Ninth Circuit's decisions." *Id.* at 312. Therefore, said the Court,

> Whether Congress thought the proposal unwise, as respondent argues, or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of Congress to act.
>
> *Id.*

Here, as noted, Congress *itself* expressly repudiated any substantive significance of its failure to reverse the district court's statutory interpretation. To ignore the legislature's admonition in this regard in the name of recognizing its intent would be entirely perverse. And, here, unlike the situation in *Price,* neither the court of appeals nor this Court had yet acted upon the issue in question when Congress declined to create a specific exception for the Hawaii Act. Thus, an unwillingness to preempt the appropriate role of appellate courts is yet another possible explanation of Congress' 1980 actions. For both these reasons, it is even clearer in this case than it was in *Price* that "no inference can properly be drawn from the failure of Congress to act." *Id.* at 512.

B. *The Alessi Opinion.* Far from providing, as appellee claims, the guidance as to ERISA preemption principles generally which, as our Jurisdictional Statement ("Juris. St.") points out (at pp. 14-20), is sorely needed, *Alessi* left that task to another day. For, this Court in *Alessi* declined to determine whether, as the court of appeals had held, the "relate to pension plans" language in § 514(a) of ERISA must be "read . . . in 'its normal dictionary sense' as indicating a broad pre-emptive in-

tent" (49 U.S.L.W. at 4508), instead reaching the same result as had the court of appeals "by a different route." *Id.* Specifically, this Court based its preemption holding in *Alessi* upon the classic preemption ground that "because it eliminates one method for calculating benefits—integration—that is permitted by federal law," the New Jersey law in question governed a matter directly addressed by ERISA and did so in a manner in conflict with the federal rule. *Id.* Since this narrow ground for decision was available, the Court expressly refused to "determine the outer bounds of ERISA's pre-emptive language. . . ." *Id.* In particular, while noting that "[o]ther courts have reached varying conclusions as to the meaning of ERISA's pre-emptive language in other contexts," citing, *inter alia*, two of the cases we relied on in our Jurisdictional Statement as conceptually in conflict with this one,[2] the Court took care to "express no views on the merits of any of those decisions." *Id.*, n.21.

Thus, *Alessi* did not determine the application of ERISA preemption to state laws, such as the Hawaii Act,

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[2] *American Telephone & Telegraph Co. v. Merry*, 592 F.2d 118 (CA 2 1979); *Stone v. Stone*, 450 F.Supp. 919 (N.D. Cal. 1978), *affirmed* 632 F.2d 740 (CA 9 1980), *certiorari denied* 49 U.S.L.W. 3979 (July 3, 1981). Appellee suggests that the implied exception to § 514(a) created in *Stone*, *Merry*, and the other marital property and support cases can be reconciled with the parsimonious reading given an express exception in this case because domestic relations laws affect employee benefit plans indirectly rather than directly. Motion at 12. *Alessi*, however, held that "[i]t is of no moment that New Jersey intrudes indirectly . . . rather than directly . . . on private pensions" (49 U.S.L.W. at 4508), noting that § 514 of ERISA in terms applies to "a state . . . which purports to regulate, *directly or indirectly* . . ." (emphasis added).

concerning matters ERISA does not address. If anything, by stressing that "'preemption of state law by federal statute or regulation is not favored'" (49 U.S.L.W. at 4507), citing a long list of traditional preemption cases, *Alessi* suggested that the creation of a "no-man's land," in which the states could not act even though the federal government has not done so, is not to be lightly inferred, at least where an express statutory exception may well apply.

2. To the extent it addresses at all the merits of the § 4(b)(3) "disability insurance" exception, appellee embraces with a vengeance the circular approach of the courts below (see Juris. St. at 13), insisting that one can ascertain the meaning of the term "disability insurance law" in § 4(b)(3) only by analyzing the content of *compulsory* disability insurance laws in effect in 1974. Motion at 10. This methodology simply assumes the answer to the basic issue raised in this appeal—whether Congress intended to forbid states in the future from mandating for employees forms of disability insurance different from those previously required by state or federal law. Surely, there is nothing inherent in the term "disability insurance laws" which would necessitate appellee's myopic approach to statutory interpretation. Rather, one would expect that, absent any reason to believe otherwise, a "disability insurance law" is simply a law concerning "disability insurance." The determinative question therefore becomes whether or not the insurance required by the Hawaii Act is "disability insurance;" if so the Hawaii Act is a "disability insurance law" within the meaning of § 4(b)(3).[3] As to this question,

[3]This is not to say that the state regulatory statutes compiled in Appendix H, pp. A-69 *et seq.*, of the Jurisdictional Statement, are,

it is far from "irrelevant" (Motion at 10) that the term "disability insurance" is used in many states to embrace precisely the type of insurance the Hawaii Act seeks to require.[4]

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to the extent they affect employee benefit plans, themselves exempt from ERISA preemption under §§ 4(b)(3) and 514(a). Such statutes *are*, contrary to appellee's extraordinary statement to the contrary, "disability insurance laws," since they are laws which concern disability insurance. However, these statutes regulate existing plans rather than mandating coverage. Therefore, no plan is "maintained solely for the purpose of complying with" such laws, and neither § 4(b)(3) nor the exception to § 514(a) incorporating § 4(b)(3) is applicable.

[4]That the United States Department of Labor was also in error as to the meaning of the term "disability insurance" (Motion at 8) does not give appellee's *ipse dixit* approach to statutory interpretation any more stature. The Department of Labor's construction was in the form of an individual opinion letter rather than a regulation or adjudication, and it concerned a part of the statute, federal pre-emption, not within the scope of the agency's role in enforcing the federal substantive requirements. More important, the construction adopted by the agency—that the Hawaii Act is not a "disability insurance" law because it does not provide "at least partially for income replacement rather than the prevention and treatment of illness" (see Motion at 4)—was *not* embraced by the court of appeals and is *not* the definition now advocated by appellee. For, both the court below and appellee have apparently recognized as entirely untenable an analysis, such as that of the Department of Labor, which turns upon whether a state's program protecting against economic injury due to nonoccupational illness or injury is enacted as two successive pieces of legislation or one integrated act. *See* Juris. St. at 11 n.8.

Of even less consequence are the views, given without any explanation, of "the author of the Hawaii Act" (Motion at 8), a professor who was indeed the draftsperson but who was neither a member of Congress, a member of the Hawaii legislature, nor for any other reason particularly knowledgeable concerning the meaning of § 4(b)(3) of ERISA.

Nor is appellee's attempt to find support in legislative history for its question-begging analysis at all successful. Both passages appellee quotes concerning the meaning of § 514(a) (Motion at 9) note expressly that the national uniformity otherwise mandated is subject to the statutory exceptions. That the exceptions were described as "narrow" (120 Cong. Rec. (Aug. 20, 1974) H. 8701 (remarks of Rep. Dent)) adds no justification for ascribing to Congress the odd intention to permit retrospective but not preventive compulsory disability insurance. With or without the Hawaii variety of disability insurance, the § 4(b)(3) disability insurance exception would be "narrow". The numerous state statutes simply regulating voluntary employee benefit plans, as well as any state schemes to mandate other benefit plans (for example, pensions, life insurance, or prepaid legal services), would remain outside its scope.[5]

Appellee claims, however, that if the Hawaii Act is recognized as mandating a form of disability insurance, "any state [could] circumvent Congress' preemptive intent by simply enacting state health insurance laws such as Hawaii's." Motion at 6; see also *id.* at 11, 13. The suggestion apparently is that the difference between state regulation of voluntary health plans and a state requirement for mandatory health plans is a matter of form rather than substance (*id.* at 6). This suggestion would certainly surprise

[5]The Welfare and Pension Plans Disclosure Act ("WPPDA") material (Motion at 10) from 1958 is also uninformative as to the intent of Congress sixteen years later. ERISA *changed* the language of the WPPDA provision otherwise parallel to § 4(b)(3). *See* Juris. St. at 9 n.5. Thus, even if the purely descriptive material appellee relies on could be read as an indication of the intent of the 1958 Congress, it surely is not helpful in understanding different terminology by a different Congress.

both the thousands of employees in Hawaii who were covered by medical benefit insurance for the first time after the 1974 Act was passed, and their employers, who incurred the cost of such coverage. It would also surprise Congress. By including the disability insurance exception in § 4(b)(3) at all, Congress delineated an area within which state activity was to be permitted; that area was defined according to whether the state law in question mandated or simply regulated disability insurance.[6] Thus, Congress evidently perceived a difference of substance, not of form, between the two types of state legislation, for it determined to sanction one and not the other.

Further, if states were as anxious to evade ERISA preemption by subterfuge as appellee supposes, one would

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[6]Appellee argues that § 4(b)(3) would be inapplicable in any event to its medical plan "because Standard's medical plan is not maintained *solely* for the purpose of complying with the Hawaii Act." Motion at 11. If Appellee is suggesting a company-by-company factual inquiry into whether a particular plan would have been different but for a state mandatory coverage law, it is reviving an argument *rejected* by the district court (Juris. St. A-30), and not raised at all in the court of appeals. Further, *Alessi, supra*, did not embrace such an awkward construction of the "maintained solely" language; rather, it simply observed that a pension plan, established to provide benefits of a type not required by any state statute, cannot in any meaningful sense be said to be "maintained solely" to comply with a workers' compensation law. 49 U.S.L.W. at 4508 n.20.

If, as appears more probable, appellee's "maintained solely" argument is meant to apply to the Hawaii Act on its face, that argument would read the "disability insurance law" exception in § 4(b)(3) out of the statute entirely: Employer-provided disability insurance of *all* kinds is "generally and historically maintained for other reasons [besides compliance with state laws]" (Motion at 11), since only five states mandate such coverage. See Juris. St. at 13 n.10.

have expected since ERISA a rush to pass statutes requiring those forms of disability insurance which appellee concedes *are* within § 4(b)(3), in order to "circumvent" ERISA preemption of state disability insurance regulation. There has been no stampede in that direction. Rather, some indication of how "simple" it is to pass statutes requiring thousands of employers to provide benefits to their employees is that, other than in Hawaii, *no* new state statute requiring employers to establish *any* variety of disability insurance has been added to the five in existence when ERISA went into effect, even though § 4(b)(3) would clearly permit such activity.

In sum, appellee has still not identified any historical or policy reason for attributing to Congress an intent to forbid states from assuring their citizens economic security by providing for adequate medical care. And, as a matter of "plain words," § 4(b)(3) clearly encompasses the Hawaii Act. Since there is consequently no basis for displacing Hawaii's right to protect its citizens as it sees fit, this case merits the Court's plenary attention.

CONCLUSION

For the reasons stated above, the motion to dismiss or affirm should be denied, and probable jurisdiction should be noted in this case.

Respectfully submitted,

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